United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-1268

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Respondent,

vs.

JACK L. CHESTNUT,

Defendant-Appellant-Petitioner.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

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TO THE HONORABLE JUDGES OF THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

JACK L. CHESTNUT, the defendant-appellant above named, presents this, his petition for a rehearing in the above entitled cause, pursuant to Rule 40, Federal Rules of Appellate Procedure, and suggests a rehearing in banc, pursuant to Rule 35, Federal Rules of Appellate Procedure, and in support thereof respectfully shows:

I.

A panel of this Court affirmed petitioner's conviction of a violation of 18 U.S.C. §§2 and 610, in an opinion by Judge Meskill decided March 8, 1976, No. 316 - September Term 1975, Docket No. 75-1268. The trial judge, Honorable Edward Weinfeld,

issued two opinions touching upon the issues presented on appeal, which are reported in 394 F.Supp. 581, and 399 F.Supp. 1292 (S.D.N.Y. 1975).

II.

The Court misapprehended the ex post facto nature of the indictment in rejecting that argument on the grounds that (1) the indictment on its face stated an offense under the applicable (1970) statute, and (2) petitioner was not misled at trial. The Court overlooks the central issue: that if the proper statute had been presented to the grand jury an indictment might well not have been returned at all. Moreover, in reaching its conclusion that an offense was stated under 1970 law the Court necessarily resolved the statute's troubling ambiguity in favor of the Government, overlooking the Constitutional principle that any ambiguity in penal legislation must be resolved strictly in favor of the accused. Rewis v. United States, 401 U.S. 808 (1971); United States v. Posnjak, 457 F.2d 1110, 1118 (2nd Cir. 1972); Schwartz v. Romnes, 495 F.2d 844 (2nd Cir. 1974). Indeed only a retrospective application of the 1972 amendment and its construction in the 1972 decision in Pipefitters Local No. 562 v. United States, 407 U.S. 385 (1972) enabled the Court to decide that the 1970 statute proscribed petitioner's conduct. This, in turn, overlooks and violates the principle of Bouie v. Columbia, 378 U.S. 347 (1964) that conduct may not be brought under a statute by later judicial construction. Thus the opinion misapprehends the ex post facto

issue, overlooks the rule of strict construction of penal legislation, and creates disunity with this Court's prior decisions.

III.

The trial court, 394 F.Supp. at 587 et seq., and this Court in adopting the trial Court's opinion on the question of the unconstitutionality of 18 U.S.C. §§591 and 610, slip opinion p. 2457, overlooked and failed to apply the same principles requiring strict construction of penal legislation referred to under paragraph II above and here, too, resolved ambiguities in favor of the Government rather than in favor of lenity. Indeed this Court's construction conflicts with the Supreme Court's construction of the same words in United States v. C.I.O., 335 U.S. 106 (1948) and United States v. Auto Workers, 352 U.S. 567 (1957). Particularly in the sensitive and exceptionally important area of political campaign regulation with the conflicting public interests at stake, and above all when criminal sanctions are involved, it is essential that the correct rules of construction be applied and enforced, lest fundamental First Amendment rights be chilled. The present opinion stands in contrast to and conflicts with this Court's decision in Schwartz v. Romnes, 495 F.2d 844 (2nd Cir. 1974), which, being a civil case, should rather be applied a fortiori.

IV.

The Court's holding that venue was proper in New York conflicts and is irreconcilable with this Court's decisions, particularly United States v. Brothman, 191 F.2d 70 (2nd Cir. 1951),

which the opinion overlooks although it was relied upon on appeal. In so doing the Court misapprehends the purpose of 18 U.S.C. §610, which clearly is to prevent improper corporate influence on elections by punishing the giving of corporate funds to and receipt of corporate funds by candidates. In this case any and all conduct by the corporation and the candidate (and petitioner on behalf of the candidate) took place outside New York. Contacts with the ultimate recipient of the funds, L&N, who were innocent of wrongdoing, were also outside New York. The record is silent as to how and by whom the checks came to New York. Thus no culpable conduct, no conduct within the ambit and proscription of §610, or of the causation provision of 18 U.S.C. §2, was proved in New York, on the part of petitioner or anyone else. Since in Burton v. United States, 196 U.S. 283 (1905) the receiving by the accused was the substantive offense the Court misapprehends its significance and misplaces its reliance there; in the present case the receiving was not by the accused but by L&N, and was not criminal, and needed not to be for there to be criminal causation under 18 U.S.C. §2. The causation, the alleged criminal agreement, was the key here; that occurred outside New York and thus the second Burton v. United States, 202 U.S. 344 (1906) controls. This was not, as the Court's opinion incorrectly implies, a case of aiding and abetting unlawful conduct, or even of causing unlawful conduct, but of the allegedly unlawful causing of lawful conduct. The Court's opinion misapprehends this critical characteristic of the venue question.

V.

The Court's opinion is clearly erroneous in holding that there was sufficient evidence to prove wilfulness, and, in view of the weakness of the evidence, in holding that the acknowledged error in receiving Lilly's foundationless legal opinion as to the unlawfulness of other acts was not prejudicial.

CONCLUSION

For all of the reasons set forth above and in our papers previously submitted and on file with this Court, it is respectfully urged that the petition should be granted and the judgment of the District Court be, upon further consideration, reversed. Because of the exceptional importance of the Constitutional issues presented and the precedential consequences of the decision both as it conflicts with other decisions and as it affects legislation and litigation relating to the surpassingly important area of political election regulation, it is respectfully suggested and urged that the questions should be reviewed by the Court in banc.

Respectfully submitted,

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Attorneys for Appellant

Certificate of Counsel

I, JACK S. NORDBY, attorney for JACK L. CHESTNUT, do hereby certify that the foregoing petition for a rehearing and suggestion for rehearing in banc of this cause are presented in good faith and not for purpose of delay.

JACK S. NORDBY

No. 3290½—Affidavit of Service by Mail. (Rev. 1957) Miller-Davis Co., Minneapolis

State of Minnesota,

ss.

County of Ramsey

Sherry Wozniak of the City of St. Paul

County of Ramsey in the State of Minnesota, being duly sworn, says that on the

20th day of March 1976 she served the annexed

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

on Paul J. Curran

the attorney(s) for Unites States of America

the Plaintiff in this action, by mailing to him 2 copy thereof, inclosed

in an envelope, postage prepaid, and by depositing same in the post office at St. Paul

Minnesota directed to said attorney(s) at 1 St. Andrews Plaza, New York, New York, 10007

the last known address of said attorney(s).

Sherry Wozniak

Subscribed and sworn to before me, this 20th

day of March 1976

MARILYN ROBERTSON
NOTARY PUBLIC MINNESOTA
Dakota County
My Comm Expires Apr 1979

Notary Public Dakota County, Minnesota

My Commission Expires